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IN THE

Supreme Court of the United States

OCTOBER TERM 1929.

No. 76

FRANK E. FURST and FRED G. THOMAS partners doing business under the firm name of FURST & THOMAS, *Appellants*,

vs.

JAMES G. BREWSTER, ED. A. DAVIS and HENRY M. BEATY, *Appellees*.

On Appeal from the Supreme Court of the State of Arkansas.

STATEMENT AS TO JURISDICTION ON APPEAL.

JESSE C. ADKINS,
FRANK F. NESBIT,
M. DANAHER,
Counsel for Appellants.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM 1929.

No. 805.

FRANK E. FURST and FRED G. THOMAS partners doing business under the firm name of FURST & THOMAS, *Appellants*,

vs.

JAMES G. BREWSTER, ED. A. DAVIS and HENRY M. BEATY, *Appellees*.

On Appeal from the Supreme Court of the State of Arkansas.

STATEMENT AS TO JURISDICTION ON APPEAL.

May it Please the Court:

The appellants in support of the jurisdiction of this Court to review the above entitled cause on appeal respectfully represent:

A

STATUTORY PROVISIONS SUSTAINING JURISDICTION.

The Act of February 14, 1925, 43 Stats. L. 937, United States Code Title 28, Section 344, provides that Section 237 of the Judicial Code is amended to read in part as follows:

> "(a) A final judgment or decree in any suit in the highest court of the state in which a decision in the suit could be had * * * where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution and treaties or laws of the United States and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

The Act of January 31, 1928, as amended by Act of April 26, 1928, United States Code Title 28, Section 861(a) substituted an appeal for a writ of error in all cases.

B

DATE OF DECREE AND DATE OF APPLICATION FOR APPEAL.

The decree sought to be reviewed was entered on November 25, 1929 (R. 449, 450).

Motion and petition for rehearing were filed on December 10, 1929 (R. 459) within the time prescribed by the rules of the Supreme Court of Arkansas. The motion and petition for rehearing were denied on December 23, 1929 (R. 460).

The application for appeal was presented to the Chief Justice of the Supreme Court of Arkansas and the appeal allowed on March 12, 1930 (R. 484, 486).

C

NATURE OF THE CASE AND RULING BELOW.

The action was originally brought by appellants below to recover $788.53 the balance due on purchase price of merchandise sold by appellants to appellee Brewster. Said merchandise consisted of articles of food, drugs, and medicines; all of said merchandise was shipped in interstate commerce by appellants from Memphis, Tennessee, to said Brewster in Drew County, Arkansas, by a common carrier by railroad.

The answers originally admitted payments upon account but denied the amount of the balance owing. In amended answers (R. 23, 27) defendants set up that appellants doing business as Furst & Thomas, a partnership, were the agents of Furst-McNess Company, an Illinois corporation which had not qualified to do business as a foreign corporation in the state of Arkansas as required by section 1826 (statute quoted R. 481) of the statutes of Arkansas (Crawford & Moses Digest) by filing in the office of the secretary of state copy of its articles of incorporation, duly certified, statement of its assets and liabilities, the amount of capital employed in the state, designating its general office or place of business in the state, and naming an agent upon whom process might be served. The Furst-McNess Company was not at any time a party to the action.

And appellants further set up that because of this failure of Furst-McNess Company to qualify as a foreign corporation, appellants, individuals, and doing business as partners, could not maintain an action in courts of the state of Arkansas to enforce a contract with Brewster because of the prohibition of section

1832 of the said statutes of Arkansas (statute quoted R. 481).

The evidence showed that appellee Brewster had frequently admitted his indebtedness to appellants, and that the merchandise sold to Brewster, to recover the balance due on which this suit was instituted, was shipped to him in interstate commerce from appellants' warehouse at Memphis, Tennessee, to Brewster in Drew County, Arkansas. There was evidence that Furst & Thomas was a partnership having its principal place of business at Freeport, Illinois, and warehouses at Memphis, Tenn., Baltimore, Md., and San Francisco, Cal. The Furst-McNess Company, an Illinois corporation, manufactured medicines, drugs and food products at its factory at Freeport, Illinois. It sold some of its products directly to wholesale druggists throughout the United States, but sold most of its products to Furst & Thomas. Furst and Thomas shipped these goods to their warehouses mentioned above. There they were sold and reshipped by Furst and Thomas to itinerant and local retail dealers. Brewster was such a dealer who ordered from appellants by mail and to whom the goods were shipped in interstate commerce by appellants (R. 63, 64, 70, 98, 421, 422, 425). Appellees introduced evidence that the Furst-McNess Company had not qualified as a foreign corporation under the Arkansas statute (R. 37). There was no evidence that said Furst-McNess Company had any place of business in or did any business in Arkansas. Appellees contended that some provisions in the contract between appellants and Brewster (R. 4) tended to show that Brewster was an agent of appellants.

Appellants drew in question the validity of the said statutes of Arkansas as sought to be applied in this

case on the ground of their being repugnant to the Constitution of the United States as unduly burdening interstate commerce and as interfering with the exclusive power of Congress to regulate commerce among the states. Appellants requested the court to instruct the jury that the said Arkansas statutes had no application to the case (R. 437) and that to so apply them as to prevent appellants from maintaining an action against Brewster to recover money due on a transaction involving interstate commerce would be repugnant to ART. I, Section 8, Clause 3 of the Constitution of the United States, which the court refused to do (R. 437).

The court further, over objection by appellants, instructed the jury that while Furst & Thomas, a partnership, had a right to do business in Arkansas and could recover from Brewster even though he was their agent, said partnership, acting as an agent of Furst-McNess Company, a foreign corporation which had not qualified as such in accordance with the statutes of Arkansas, could not maintain an action in courts of Arkansas, and that if the jury found that appellants were the agents of Furst-McNess Company, a non-qualified foreign corporation, and that Brewster was appellants 'agent, then the jury should find for the appellees (R. 431, 432).

The court further instructed the jury that if appellee Brewster was the agent of appellants, and they in turn were the agents of Furst-McNess Company, a foreign corporation, not qualified in accordance with the statutes of Arkansas, the jury should find for the defendants below (R. 441); and the jury did find for the defendants below.

These rulings, instructions, and findings were

adopted and affirmed by the highest court of the state of Arkansas in which a decision could be had, to wit, the Supreme Court of Arkansas. Notwithstanding the contention of appellants that the said statutes of the state of Arkansas as so construed and applied were invalid on the ground of their being repugnant to the Constitution of the United States, and particularly to Art. I, Section 8, Clause 3, and Amendment XIV, the said Supreme Court of Arkansas decided in favor of the validity of the said statutes as so applied and construed (R. 449, 450, 460, 461-473).

The court in effect held that the state courts of Arkansas were closed to appellants and that under the provisions of the Arkansas statutes prohibiting a non-qualified foreign corporation from enforcing a contract in the Arkansas courts they could not maintain an action to recover money due on shipments of goods in interstate commerce to appellee Brewster because appellants, as individuals and partners, acted as agents of the Furst-McNess Company, an Illinois corporation, which had not qualified as required by the statute. These statutes, so applied were repugnant to the commerce clause of the Constitution of the United States and yet were held valid by the Supreme Court of Arkansas.

D

CASES BELIEVED TO SUSTAIN JURISDICTION.

The following decisions of this Court are believed to sustain the jurisdiction of this appeal:

International Text Book Co. v. Pigg, 217 U. S. 91

Sioux Remedy Co. v. Cope, 235 U. S. 197

Buck Stove & Range Co. v. Vickers, 226 U. S. 205
International Text Book Co. v. Peterson, 218 U. S. 664
Wilson-Moline Buggy Co. v. Hawkins, 223 U. S. 713 (per curiam opinion)
McCall v. California, 136 U. S. 104
Crutcher v. Kentucky, 141 U. S. 47

We respectfully submit that this Court has jurisdiction of this appeal by virtue of section 237 of the Judicial Code as amended by the Act of February 13, 1925.

Respectfully submitted,

JESSE C. ADKINS,
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M. DANAHER,
Counsel for Appellants.